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OVERSEAS REALTY SDN BHD

v.

WONG YAU CHOY & ORS; TETUAN TAY IBRAHIM & PARTNERS (THIRD PARTY)

B

HIGH COURT MALAYA, IPOH
HARMINDAR SINGH DHALIWAL J
[CIVIL SUIT NO: 22NCVC-232-10-2012]
28 JANUARY 2014

C

LAND LAW: *Transfer - Fraud - Forgery - Whether registration of title secured by fraud, forgery or void instrument - Whether title or interest acquired by subsequent purchasers in good faith and valuable consideration - Whether transfer of property and charge defeasible - National Land Code, ss. 210(3) & 211(1)*

D

LAND LAW: *Indefeasibility of title and interests - Fraud - Fraudulent use of computerised issue document title - Computerised title for registered owner's land issued in name of another - Whether Registrar of Titles and Director of Lands and Mines grossly negligent and breached statutory duties - Whether registered owner's name should be restored*

E

LEGAL PROFESSION: *Duty of care - Solicitors - Whether solicitor had knowledge that vendor of property was bankrupt - Whether property acquired after individual adjudicated bankrupt - Whether bank bound by solicitor's knowledge and actions - Whether solicitor liable for damages for wrong advice to purchaser*

F

BANKRUPTCY: *Dealings in property - Undischarged bankrupt - Property acquired after individual adjudicated bankrupt - Disposal of after-acquired property - Whether transaction valid - Whether could give good title to property - Whether bankrupt had legal capacity to enter into contract to sell after-acquired property - Whether contract voidable at option of Director General of Insolvency ('DGI') - Whether DGI vested with equitable interest in property*

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The plaintiff company was the registered and beneficial owner of a property located in Canning Garden, Ipoh, Perak ('the said property'). Despite having the manual original issue document of title and despite not entering into any transaction for sale or transfer of the said property, the plaintiff found itself dispossessed of the said property. The said property was transferred to the first

I

defendant for a consideration of RM250,000 who then transferred it to the second defendant. The said property was then charged to the third defendant bank as security for a loan taken by the second defendant. The plaintiff claimed that in respect of the purported memorandum of transfer ('MOT') between the plaintiff and the first defendant, the plaintiff did not affix the common seal of the plaintiff on the MOT and there was no statement that the seal of the plaintiff was affixed in the presence of the company secretary and a director. Further the signatures of the director, Ong Eng Lian ('PW2') and the secretary, Albert Lim Hock Huat ('PW3') had been forged by persons unknown to the plaintiff. At the time of the alleged sale and transfer of the said property, the first defendant was an undischarged bankrupt. Nevertheless, the first defendant sold and transferred the said property to the second defendant for a consideration of RM650,000. On the other hand, the second defendant had prior knowledge that the first defendant was a bankrupt and was advised by a solicitor one Mr Daniel Lim of Messrs Tay Ibrahim & Partners ('third party') that no loan could be disbursed to the second defendant to finance the purchase of the said property. Daniel Lim was purported to have advised the second defendant to buy the said property by paying the first defendant cash without any loan from the bank. The second defendant claimed that he acted on the advice of the third party and proceeded to enter into a sale and purchase agreement with the first defendant. The first defendant prepared the said sale and purchase agreement and the second defendant became the registered proprietor of the said property on 4 March 2011 although he had yet to pay the full purchase price. Subsequently, the second defendant obtained a refinancing loan of RM520,000 from Malayan Banking Bhd ('third defendant'). A charge over the said property as security for the loan was executed and registered. Daniel Lim and the third party handled the loan documentation on behalf of the third defendant but did not inform the third defendant that the second defendant had purchased the said property from an undischarged bankrupt. The third defendant contended that they had no knowledge of the first defendant's bankruptcy and that the said bankruptcy was not relevant to the bank as the said property was an after-acquired property, *ie*, property acquired by the first defendant after he had became a bankrupt. The bank contended that an after-acquired property was not vested in the Director General of Insolvency ('DGI'). In addition, the original MOT which should be in the possession and custody of the fourth and fifth defendants was missing and had

not been found. The plaintiff's cause of action against the first defendant was based on fraud and forgery. The plaintiff's allegation against the second and third defendant was that they were not *bona fide* purchasers within the meaning of s. 340(2) of the National Land Code ('NLC') and their registered interest in the said property should be set aside. The plaintiff's cause of action against the fourth to sixth defendants was negligence and breach of their statutory duty in transferring the title to the first defendant. The plaintiff claimed that the purported MOT between the first defendant and the plaintiff was an insufficient instrument which was not fit for registration and that the computerised title was issued unlawfully. The second and third defendants in return, sought to be indemnified by the fourth to sixth defendants in the event their interests in the said property were set aside. Finally, there was also a claim by the second defendant against the third party for contribution and damages in that the third party had advised the second defendant to pay cash to the first defendant and the purchase was concluded on reliance of the alleged advice.

Held (allowing plaintiff's claim with costs; dismissing second defendant's claim against third party with costs):

(1) Forgery and fraud had been committed in the transfer of the said property from the plaintiff to the first defendant. The transfer was therefore ineffective by virtue of s. 340(2) of the NLC. Apart from fraud and forgery, the purported MOT between the plaintiff and the first defendant was also proved to be an insufficient document and unfit for registration as it had not been executed as required under s. 210(3) of the NLC and attested as required by s. 211(1) of the NLC. (paras 13 & 14)

(2) There was non-compliance with the provisions of the NLC when the fifth and sixth defendants embarked upon their exercise to convert land titles in Perak to computerised IDT's in Form 5BK. Prior to computerisation, there were two copies of the manual IDT, one kept by the land office and the other by the proprietor. Under the scheme of conversion set out in s. 8 of the 14th Schedule, the computerised IDT would have been validly issued and effective when firstly the manual IDT in the possession of the land office was endorsed and cancelled, and secondly when the proprietor was called upon to take delivery of the computerised IDT in exchange for the

manual IDT in the possession of the proprietor, and thirdly when the manual IDT was destroyed. The failure to comply with such provisions rendered the computerised IDT issued by the land office null and void. (paras 16, 17 & 18)

(3) The onus was on the second and third defendant to prove that the title and interest to the said property was acquired in good faith and for valuable consideration as required by the proviso of s. 340(3) of the NLC. The second defendant knew he was buying property from an undischarged bankrupt and was ready to purchase the property by way of a cash transaction. This casts serious doubts on the *bona fides* of his transaction with the first defendant. Further, at the time of the execution of the transfer, the purchase price had yet to be paid to the first defendant. Considering the circumstances, the second defendant was certainly not a *bona fide* purchaser of the said property. (paras 21, 25, 26 & 27)

(4) Daniel Lim of the third party was privy to the vital information of the first defendant's bankruptcy. It could not have been irrelevant or unconnected to the third defendant's loan to the second defendant as the bankruptcy may affect the indefeasibility of the title of the second defendant to the said property. This information was available to Daniel Lim before and during the time the third defendant had appointed the third party as its solicitor and agent and must be bound by the agent's knowledge and actions. The third defendant could not now hide behind its solicitor. (para 31)

(5) Although the bankrupt had the legal capacity to enter into a contract to sell 'after-acquired' property, such contract was voidable at the option of the DGI and the proceeds of the sale of any such property by the bankrupt shall be deemed to be the property of the DGI by resort to s. 53B(1) of the Bankruptcy Act 1967. The DGI could apply and register itself as proprietor of any such property by recourse to s. 349 of the NLC. Until such property was registered, the DGI would be vested with an equitable interest in the said property. With the knowledge that the second defendant had acquired property from a bankrupt, it was incumbent upon the third defendant to make inquiries as to how the first defendant had come to acquire the said property. Therefore, the third defendant did not take its charge in good faith and for valuable consideration within the meaning as intended by the proviso of s. 340(3) of the NLC. (paras 35, 36, 37 & 39)

(6) The provisions of the 14th Schedule of the NLC were not followed in the issuance of the computerised title for the said property. The plaintiff was not notified nor was the original IDT recalled and destroyed. The Land Administrator had an obligation to keep such documents in safe custody under s. 375 of the NLC. Thus, the fourth and fifth defendants could not hide behind s. 22 of the NLC and claim they acted in good faith in carrying out their duties. (paras 42, 44 & 46)

(7) It was inconceivable that the second defendant relied on the advice of Daniel Lim as the second defendant was a literate businessman with several properties. The second defendant was bent on concluding this deal although the second defendant knew as a consequence of dealing with an undischarged bankrupt, the said property could be claimed by the DGI. The second defendant's claim on this transaction now would be against public policy as the court would not want to be seen to condone and approve of such conduct. Thus, the claim by the second defendant against the third party failed. (paras 49 & 50)

(8) The plaintiff was entitled to be restored as the registered owner and since the second and third defendants had failed to prove that they were *bona fide* purchasers for value, their interest in the said property was set aside and cancelled. As the fourth, fifth and sixth defendants had failed in their statutory duty to ensure a safe system of land registration, they would have to indemnify the second and third defendants. As for the second defendant, the original loss would be the sum of RM650,000 being the purchase price paid to the first defendant. However, since the second defendant obtained a loan of RM520,000 from the third defendant with the said property as security, his loss was RM130,000 being the difference between the sale price and the loan sum received from the third defendant. (paras 51-53)

Case(s) referred to:

Abu Bakar Ismail & Anor v. Ismail Husin & Ors & Other Appeals [2007] 3 CLJ 97 CA ***(refd)***

Agroco Plantation Sdn Bhd & Anor v. Besharapan Sdn Bhd & Ors [1998] 5 CLJ 19 HC ***(refd)***

Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA ***(refd)***

Chen Hoy Shan v. Professor Dr Aljafri Abdul Majid & Ors [2011] 1 LNS 369 HC ***(refd)***
Doshi v. Yeoh Tiong Lay [1974] 1 LNS 30 FC ***(refd)***
Hock Hua Bank Bhd v. Choo Meng Chiong & Anor [1999] 7 CLJ 300 HC ***(refd)***
Koh Thong Chuan v. The Official Assignee of the property of Koh Liang Hee, Bankrupt [2003] 1 CLJ 125 CA ***(refd)***
Kwan Chew Shen v. Citibank, NA [1987] 1 CLJ 314; [1987] CLJ (Rep) 704 HC ***(refd)***
Naylor v. Preston Area Health Authority [1987] 2 All ER 353 ***(refd)***
Ong Chat Pang & Anor v. Valliappa Chettiar [1971] 1 LNS 96 FC ***(refd)***
Rolland v. Hart (1871) 6 Ch App 678 ***(refd)***
Shayo (M) Sdn Bhd v. Nurlieda Sidek & Ors [2013] 1 CLJ 153 HC ***(dist)***
State Tailor Sdn Bhd v. Nallapan [2005] 2 CLJ 167 CA ***(refd)***
Uptown Properties Sdn Bhd v. Pentadbir Tanah Wilayah Persekutuan & Ors [2012] 3 CLJ 271 HC ***(dist)***
Wilsher v. Essex Area Health Authority [1986] 3 All ER 801 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 24(4), 48(1)(b)(i), 53B(1)
Contracts Act 1950, s. 182
Evidence Act 1950, s. 114(g)
National Land Code, ss. 5A, 22, 210(3), 211(1), 340(2)(a), (3), 349, 375(2), 14th Schedule s. 8
Rules of Court 2012, O. 34

For the plaintiff - Shan Theivanthiran (Premah Kaliaperumal with him); M/s Thevin Chandran & Assocs
For the 2nd defendant - Rashpal Singh; M/s Rashpal Singh & Co
For the 3rd defendant - Nur Azean Lee @ Lee Pooi Mun; M/s Khong & Son
For the 4th to 6th defendants - Norazura Mohd Mokhtar; State Legal Adviser, Perak

Reported by Sandra Gabriel

JUDGMENT

Harmindar Singh Dhaliwal J:

[1] This was yet another action arising from problems relating to the computerisation of land titles in the state of Perak. The plaintiff company was the registered and beneficial owner of property held under Geran 3362, Lot 46209, Mukim Ulu Kinta, District of Kinta, State of Perak together with a dwelling house built thereon and known as No. 21, Jalan Keliling, Canning Garden, Ipoh, Perak ("the said property"). Despite having the manual original issue document of title and paying all quit rent and assessments,

and despite not entering into any transaction for sale or transfer of the said property, the plaintiff found itself dispossessed of the said property. The said property came to be transferred to the first defendant who then transferred it to the second defendant. The said property was then charged by the second defendant to the third defendant bank as security for a loan taken by the second defendant from the third defendant. The plaintiff by this action seeks essentially to restore itself as the owner of the said property and to be given vacant possession of the same.

The Salient Facts

[2] The salient facts leading to the filing of this action can be stated as follows. Sometime on 26 April 2011, the plaintiff's directors, Ong Eng Ming (PW1) and Ong Eng Lian (PW2) saw several people dismantling the house erected on the said property. Upon enquiries and information received from the second defendant and after conducting a private search on 27 April 2011, the plaintiff found that the title to the said property had been transferred into the name of the first defendant on 17 February 2011 for a consideration of RM250,000 and thereafter into the name of the second defendant on 4 March 2011. The said property was subsequently charged by the second defendant to the third defendant bank on 21 March 2011 as security for a loan taken by the second defendant from the third defendant.

[3] The plaintiff was quite understandably shocked by this discovery as it did not at any material time sell or agree to sell and transfer the said property to the first defendant and it did not execute any documents/instruments in relation to the purported sale and transfer of the said property and it also did not receive any valuable consideration from the first defendant. The plaintiff claimed that in respect of the purported memorandum of transfer ("MOT") between the plaintiff and the first defendant, the plaintiff did not affix the common seal of the plaintiff on the MOT and there is no statement that the seal of the plaintiff was affixed in the presence of the company secretary and a director.

[4] It also transpired that the signatures of the director, Ong Eng Lian (PW2) and the secretary, Albert Lim Hock Huat (PW3) had been forged by person or persons unknown to the plaintiff. The signature of the first defendant in the MOT was alleged to have been witnessed by a solicitor, namely Mr Surendran a/l

Suppiah (PW4), who is practising in Ipoh. PW4 told the court that he did not at any time handle the purported transfer transaction between the plaintiff and the first defendant and also that the signature above his name in the MOT is not his. To add to the problems, the original MOT which should be in the possession and custody of the fourth and fifth defendants is missing and has not been found until now.

[5] Now it also turned out that at the time of the alleged sale and transfer of the said property between the plaintiff and the first defendant, the first defendant was and still is an undischarged bankrupt pursuant to a receiving and adjudicating order made against him on 9 December 2004. Nevertheless, the first defendant sold and transferred the said property to the second defendant for a consideration of RM650,000. It was not disputed that at the material time, the second defendant had prior knowledge that the first defendant was a bankrupt through a search done on 22 February 2011 by a solicitor Mr Daniel Lim of Messrs Tay Ibrahim & Partners (third party) who had initially been approached by the second defendant to conduct the transaction in respect of the purchase and transfer of the said property between the first and second defendants.

[6] It transpired that one day earlier, that is 21 February 2011, the first and second defendants together with one Gabriel had met Mr Daniel Lim at the third party's office. It was alleged by the second defendant that the sale and purchase agreement was signed between the parties and a cheque for the sum of RM50,000 was handed over by the second defendant to the first defendant. Daniel Lim on the other hand claimed that only a draft agreement was prepared and he had no knowledge of the payment by cheque.

[7] The next day, that is the 22 February 2011, the parties were called in by the third party to be present at the third party's office. The parties were informed by Daniel Lim as to the first defendant's bankruptcy. Daniel Lim advised that no loan could be disbursed to the second defendant to finance the purchase of the said property. What happened next is a matter of dispute. Daniel Lim asserted in his evidence that he told the second defendant to deal and pay the purchase price to the Director General of Insolvency. The second defendant is then alleged to have asked Daniel Lim, who denies this, as to whether the first defendant's bankruptcy prevented him from purchasing the said property.

Daniel Lim is purported to have advised that there were two ways of looking at it; firstly to forget about purchasing the said property or secondly to buy the said property by paying the first defendant cash without any loan from the bank. It was also alleged to have been suggested that if the second defendant became the registered owner first by borrowing money to pay the first defendant in cash, he could then return to obtain a refinancing loan by charging the said property to the bank and then repay the moneys he had initially borrowed.

[8] The second defendant claims that he acted on the advice of the third party and proceeded to enter into a sale and purchase agreement with the first defendant. It was the first defendant who prepared the said sale and purchase agreement which was signed before a Commissioner of Oaths and the relevant transfer form was signed before the Penolong Pentadbir Tanah Kinta on 23 February 2011. The second defendant became the registered proprietor of the said property on 4 March 2011 although by his own admission he had yet to pay the full purchase price.

[9] Subsequently, the second defendant obtained a refinancing loan of RM520,000 from the third defendant bank by a letter of offer dated 15 March 2011. A charge over the said property as security for the loan was executed on 17 March 2011 which charge was registered on 21 March 2011. The said loan was released to the second defendant by the third defendant on the same day. It transpired that it was the same Daniel Lim and the third party which on this occasion handled the loan documentation on behalf of the third defendant bank. Daniel Lim admitted that he did not at any time inform the third defendant that the second defendant had purchased the said property from an undischarged bankrupt as he took the view that the refinancing loan was unconnected with the first defendant. At the present time, the second defendant continues to occupy the said property.

The Claims Of The Parties

[10] The plaintiff's cause of action against the first defendant is based on fraud and forgery. The first defendant however did not enter any appearance to contest the claim and his whereabouts are unknown. The plaintiff's allegation against the second and third defendants is that they are not *bona fide* purchasers within the meaning of s. 340(2) of the National Land Code ("NLC") and

their registered interest in the said property should be set aside. The plaintiff's cause of action against the fourth to sixth defendants was negligence and breach of their statutory duty in transferring the title to the first defendant. The plaintiff claimed that the purported MOT between the first defendant and the plaintiff was an insufficient instrument which was not fit for registration. They also claimed that the computerised title was issued unlawfully.

[11] The second and third defendants in return are seeking to be indemnified by the fourth to sixth defendants in the event their interests in the said property are set aside. They are also relying on breach of statutory duty and/or negligence. Finally, there is also a claim by the second defendant against the third party for contribution and damages in that the third party had advised the second defendant to pay cash to the first defendant and the purchase was concluded on reliance of the alleged advice.

The Issues

[12] Given the factual matrix as outline earlier, the broad issues for consideration by the court can be summarised as follows:

(i) Whether the registration of the title of the said property of the plaintiff to the first defendant was obtained or secured by fraud, forgery and/or by means of insufficient or void instrument?
("first issue")

(ii) Whether the transfer of the said property from the plaintiff to the first defendant was null and void and if so whether the subsequent transfer and dealing on the said property is also null and void?
("second issue")

(iii) Whether the title or interest acquired by the second and third defendants was in good faith and for valuable consideration?
("third issue")

(iv) Whether there was breach of statutory duty and/or negligence on the part of the fourth and fifth defendants in the transfer of the property from the plaintiff to the first defendant?
("fourth issue")

(v) Whether the second defendant is entitled to damages against the third party for acting on the purported advice in concluding the purchase of the said property by the second defendant from the first defendant?
("fifth issue")

First Issue

[13] In this regard, the first defendant did not file an appearance nor appeared in court to contest the claim. There was nevertheless overwhelming evidence that the instrument of transfer was defective in that neither the plaintiff company nor the lawyer attesting the document (S12) had ever signed the instrument of transfer and the sale and purchase agreement. This was convincing evidence that forgery and fraud had been committed in the transfer of the said property from the plaintiff to the first defendant. The transfer was therefore ineffective by virtue of s. 340(2) of the NLC which reads:

> (2) The title or interest of any such person or body shall not be indefeasible:
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by written law.

[14] Apart from fraud and forgery, the purported MOT between the plaintiff and the first defendant was also proven to be an insufficient document and unfit for registration as it had not been executed as required under s. 210(3) of the NLC and attested as required by s. 211(1) of the NLC.

Second Issue

[15] In relation to the second issue, the question that stands out is how was the transfer of property effected from the plaintiff to the first defendant when the manual issue document of title ("IDT") was all along and even until today in the possession of the plaintiff. The evidence revealed that the transfer from the

plaintiff to the first defendant was realised by the use of a computerised IDT which was not even the first computerised IDT but a subsequent one. This indicated that there was an issuance of a computerised IDT by the land authorities in respect of the said property but no evidence was led by the fourth to sixth defendants to explain the circumstances under which the first computerised IDT was issued. I think their failure to do so in the face of allegations of breach of statutory duty and negligence must invite the invocation of s. 114(g) of the Evidence Act 1950 in that there was non-compliance with the provisions of the NLC.

[16] In any event, it was also plain and obvious that there was non-compliance with the provisions of the NLC when the fifth and sixth defendants embarked upon their exercise to convert land titles in Perak to computerised IDT's in Form 5BK. The governing statutory provision for this computerisation exercise came from s. 5A NLC, as the enabling provision, to be read together with the 14th Schedule. Section 8 of the 14th Schedule sets out in some detail the process required to be followed in converting the existing register documents of title to the computer printed register documents of title. Section 8 appears as follows:

8. Conversion to computer register document of title

(1) Upon the coming into force of the Computerized Land Registration System in a land Registry, the Registrar shall convert the existing register documents of title to the computer printed register documents of title and shall sign and seal the same.

(2) An existing register document of title shall continue to be in force and valid for all purposes of this Act until a computer printed register document of title is prepared and signed and sealed by the Registrar.

(3) After the conversion of an existing register document of title, the existing issue document of title in respect thereof shall continue to be in force and valid for all purposes of this Act until the relevant computer printed issue document of title is prepared and issued to the proprietor.

(4) Any registered proprietor whose land comes within the jurisdiction of a land Registry in which the Computerized Land Registration System is implemented may at any time apply for conversion of an existing issue document of title to a computer printed issue document of title by lodging the existing issue document of title at the said land Registry.

(5) The Registrar may on his own accord convert any existing issue document of title without there being an application made under sub-paragraph (4).

(6) In respect of an existing document of title prepared under the National Land Code, the computer printed document of title shall be prepared as in 5BK, 5CK, 5DK, 5EK, 11AK or 11BK, as the case may be, with the plan of the land in Form B1 or B2, as the case may be.

(7) In respect of an existing document of title prepared under the previous land law, the computer printed document of title shall bear the like title with the plan of the land in Form B1 or B2, as the case may be.

(8) The title to be issued under subparagraph (7) shall be deemed to be a title in continuation.

(9) Upon the conversion of an existing document of title to a computer printed document of title under the preceding sub-paragraphs, the Registrar shall:

(a) make two copies of the plan from the existing register document of title, where in the case for final title, from the copy as approved by the Director of Survey and Mapping under paragraph 396(1)(e), in Form B1 or B2, as the case may be, and shall be duly authenticated under his hand and seal;

(b) endorse across the face of the existing register document of title to the effect that the title in question has been converted to the computer printed register document of title; and on the making of such endorsement the existing register document of title shall be deemed to have been cancelled;

(c) call upon the proprietor to take delivery of the computer printed issue document of title and the plan of the land: provided that where the conversion is effected by the Registrar on his own accord under sub-paragraph (5), he shall not be obliged to deliver to the proprietor the computer printed issue document of title unless the existing issue document of title is produced to him; and

(d) cancel and destroy the existing document of title when submitted to him.

[17] It should be observed at the outset that prior to computerisation there were always two copies of the manual IDT, one kept by the land office and the other by the proprietor. Under the scheme of conversion set out in s. 8 of the 14th Schedule, the computerised IDT will have been validly issued and effective when firstly the manual IDT in the possession of the land office is endorsed and cancelled, and secondly when the proprietor is called upon to take delivery of the computerised IDT in exchange for the manual IDT in the possession of the proprietor, and thirdly when the manual IDT is destroyed.

[18] It is worth mentioning that until a computerised IDT is issued to the proprietor, the previous manual IDT remains in force and is valid. Significantly as well, the computerised IDT is not a new title, but rather a title in continuation from the previous manual IDT. Given this system to be employed as mandated by the provisions of the NLC, the plaintiff submitted that the failure to comply with such provisions rendered the computerised IDT issued by the land office null and void as was declared in the cases of *Shayo (M) Sdn Bhd v. Nurlieda Sidek & Ors* [2013] 1 CLJ 153 and *Uptown Properties Sdn Bhd v. Pentadbir Tanah Wilayah Persekutuan & Ors* [2012] 3 CLJ 271; [2012] AMR 653.

[19] At first sight, this contention appears to be compelling given what was held in *Shayo* and *Uptown*. However a careful perusal unveiled, in my view, a material distinguishing factor between these two cases cited and the instant case. In the two cases cited, there was really a clash of titles between two different personalities. In the instant case, the plaintiff did not lose ownership of the said property with the issuance of the computerised IDT. Ownership was lost through the fraudulent use of the computerised IDT in the plaintiff's name.

[20] No doubt there were two title deeds or documents of title and the computerised title was improperly issued but the significant feature in this case is that both of them bore the plaintiff's name. The title which signifies the right to the said property as well as the title deeds which are evidence of the legal ownership of the said property remained with the plaintiff. The improper issuance of the computerised IDT in the particular circumstances of this case cannot therefore have the effect of invalidating all subsequent transactions in respect of the said property. It would be self-defeating and incongruous for the

plaintiff to impeach ownership of the said property; ownership which it has not lost unlike in the cases of *Shayo* and *Uptown* where the computerised titles were issued in the name of someone else who was a total stranger without any claim for ownership.

Third Issue

[21] In view of the court's findings on the second issue, it is now necessary to determine if the transfer of the property to second defendant and the third defendant's charge is defeasible. The onus is on the second and third defendants to prove that the title and interest to the said property was acquired in good faith and for valuable consideration as required by the proviso of s. 340(3) NLC which reads:

> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2):
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested;
>
> Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser (see *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269).

[22] Now who is a good faith purchaser or sometimes known as a *bona fide* purchaser has been considered in a number of cases. In *State Tailor Sdn Bhd v. Nallapan* [2005] 2 CLJ 167 the Court of Appeal held that the basic element of good faith is the absence of fraud, deceit or dishonesty and the knowledge or means of knowledge of such at the time of entry into a transaction but the overriding consideration is the particular circumstances of each case (per Richard Malanjum JCA (as he then was) at p. 184).

[23] In another Court of Appeal decision in *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526, Raus Shariff JCA (as he then was) in a separate but supporting judgment held that a purchaser in good faith does not include a purchaser who is careless or who had been negligent. His Lordship took the view that a subsequent purchaser was "under an obligation to

investigate properly all matters relating to the sale of the said land and not to just blindly accept what was claimed by the vendor as correct and genuine." When the purchaser "failed to take the ordinary precautions which ought to be taken in such a matter he is not entitled to the protection of the court." (at p. 554)

[24] It may therefore be surmised that in order to prove there was a *bona fide* purchase what is required of the purchaser is to establish that there was an honest dealing or honest conduct in the acquisition of any title or interest in any property (see also *Ong Chat Pang & Anor v. Valliappa Chettiar* [1971] 1 LNS 96; [1971] 1 MLJ 224). In this regard, there is a duty to make the necessary enquiries regarding the dealing as the particular circumstances of the case demands so as to acquire knowledge of any improper conduct. Any person who in the circumstances ought to have made the necessary inquiries but fails to do so may be guilty of wilful blindness or voluntary ignorance such that it would amount to unfair conduct. Even carelessness or negligence in doing so would disentitle the subsequent purchaser to the title or interest of any such property. It cannot be gainsaid that the duty to do so cannot be a light one as otherwise gross injustice would befall the innocent owner of the land.

[25] Dealing first with the second defendant, it was common ground that he knew he was buying property from an undischarged bankrupt. That in itself would cast some aspersions on the *bona fides* of his purchase. This is because the Director General of Insolvency may later make a claim on the said property as will be alluded to later in the judgment. The second defendant candidly admitted in his testimony that he was aware of this. He also knew of this as Daniel Lim, a partner of the third party had apprised him of this risk. Instead of aborting the deal when he had the opportunity to do so, the second defendant chose to persist with the purchase. Although he told the court that he would never lend money to a bankrupt, the second defendant was ready to purchase property from one by way of a cash transaction. This casts serious doubts on the *bona fides* of his transaction with the first defendant.

[26] Now when Daniel Lim refused to proceed with the sale transaction, an honest dealer would have engaged a lawyer to carry out inquiries as to the title and the circumstances under which the first defendant came to acquire this property. Any

reasonable and honest person would want to know if this bankrupt had acquired the property lawfully but not so the second defendant. Instead, he relied on the bankrupt first defendant to prepare the sale and purchase agreement and had it signed before a Commissioner of Oaths. By his own admission, the second defendant had indeed purchased properties before and had many friends who are lawyers but he did not deem it prudent for the agreement to be vetted by any one of them. Worse still, he agreed to pay the sum of RM650,000, no small sum by any measure, in cash. What is most suspicious however is that at the time of the execution of the transfer on 23 February 2011, the purchase price had yet to be paid to the first defendant. This begs the question – why would a vendor part with his property before receiving the full purchase price. Furthermore, under the agreement the second defendant had four months to pay the balance of the purchase price – so why then the haste to complete the purchase within a matter of days?

[27] Another questionable circumstance is the mode of payment of the purchase price. The cheques issued in purported payment of the purchase price were issued in the name of "Wong Yau Choy" or "Bearer". Being cash cheques, these could have been cashed over the counter. Also, cheques for the same amount of RM50,000 were repeatedly issued and cashed leading to serious doubts as to whether consideration was paid for the purchase of the said property. Importantly however, no evidence was led to prove that the proceeds of the cheques reached the first defendant. At the very least, the second defendant would have been alerted that something is not quite right here. Considering these circumstances I am convinced beyond any doubt that the second defendant was certainly not a *bona fide* purchaser of the said property.

[28] I come now to the third defendant. The third defendant released a loan of RM520,000 to the second defendant. A charge was registered on the said property as security for the loan. The third defendant bank is saying that they had no knowledge of the first defendant's bankruptcy and that the said bankruptcy was not relevant to the bank. This was because the said property was an "after-acquired" property, that is, property acquired by the first defendant after he had become a bankrupt. The bank contends that "after-acquired" property is not vested in the Director

General of Insolvency. Further, the Director General of Insolvency has not taken any steps to avoid the disposal of the property by the first defendant to the second defendant.

[29] In this regard, the bank's solicitor, the same Daniel Lim of the third party, who was instructed to prepare the loan documents and register the charge, had full knowledge of the first defendant's bankruptcy as he had met both the first and second defendant in his office prior to being instructed by the third defendant's bank. Does this prior information bind the third defendant's bank? The general rule is that the knowledge of a solicitor is the knowledge of the client so that it is not open to the client to say that the solicitor did not disclose the true facts to him (*Doshi v. Yeoh Tiong Lay* [1974] 1 LNS 30; [1975] 1 MLJ 85). Speaking for the Federal Court in *Doshi*'s case, Gill CJ followed the case of *Rolland v. Hart* (1871) 6 Ch App 678 where Lord Hatherley LC said:

> ... It has been held over and over again that notice to a solicitor of a transaction and about a matter as to which it is part of his duty to inform himself, is actual notice to his client. Mankind would not be safe if it were held that, under such circumstances, a man who has not notice of that which his agent has actual notice of. The purchaser of an estate has, in ordinary cases, no personal knowledge of the title, but employs a solicitor, and can never be allowed to say that he knew nothing of some prior incumbrance because he was not told of it by his solicitor.

[30] Gill CJ, however, referred to the *Halsbury's Laws of England* (3rd edn.) and held that the solicitor's knowledge of fraud cannot be imputed to the principal. Nevertheless, the Court of Appeal in *Abu Bakar Ismail & Anor v. Ismail Husin & Ors & Other Appeals* [2007] 3 CLJ 97 by majority held that the decision of the Federal Court in *Doshi* that the solicitor's knowledge on fraud could not be imputed on the principal is not applicable in cases concerning an impeachment of title under s. 340(2)(a) NLC. The court further held that s. 340(2)(a) NLC entitles a plaintiff to defeat the title of a registered proprietor or chargee in two distinct circumstances. Firstly, the plaintiff may succeed by showing that the registered proprietor was a party or privy to the fraud in a given case. Secondly, assuming the plaintiff cannot show this, the plaintiff may succeed by showing that the registered proprietor's agent was party or privy to the fraud or misrepresentation in question.

[31] In the instant action, Daniel Lim of the third party was privy to vital information pertaining to the transfer of the said property between the first and second defendant. This vital information was the first defendant's bankruptcy. It could not have been irrelevant or unconnected to the third defendant's loan to the second defendant as the bankruptcy may affect the indefeasibility of the title of the second defendant to the said property. This information was available to Daniel Lim before and during the time the third defendant bank had appointed the third party as its solicitor and agent and must be bound by the agent's knowledge and actions. The third defendant bank cannot now hide behind its solicitor.

[32] It was also suggested that the information must be obtained by the agent in the same transaction in which the principal engaged the agent to transact his business. However, s. 182 of the Contracts Act 1950 talks about information "given or obtained in the course of business transacted by him for the principal". Surely the information about the first defendant's bankruptcy was obtained both before and during the course of business transacted for the principal. It was not some piece of information that was alien to the transaction. So in essence, the general rule that the knowledge of a solicitor is the knowledge of the client must apply to the facts in the present case.

[33] Now having such knowledge, I find it curious that the third party did not think it fit to inform the third defendant bank of the first defendant's bankruptcy. Daniel Lim may well have been grappling between his loyalty to his client the third defendant bank and the second defendant who had only a few days earlier approached him for assistance in the purchase of the said property from the first defendant. There was also evidence of a prior loan approval by the third defendant bank to finance the second defendant's purchase of the said property from the first defendant which loan did not materialise. It is safe to assume and indeed it was the position of the third defendant's witness (DW3), a bank manager with the third defendant, that the bank would not have granted such a loan if it had known of the bankruptcy. And the reason for that is not only because it would be a bad credit risk as suggested by learned counsel for the third defendant but also because the Director General of Insolvency may exercise its right over the property by virtue of s. 349 NLC which states:

349. Registration of Official Assignee

(1) Where the Official Assignee claims any land, or share or interest in land, under any written law for the time being in force relating to bankruptcy, he may apply to the Registrar under this section for the registration thereof in his name, and the Registrar shall give effect to the application by endorsing a memorial of the transmission on the register document of title to the land in question or, as the case may be, the land in which the share or interest in question subsists.

(2) Every such memorial shall be signed and sealed by the Registrar, and a copy thereof shall, if he is able to secure its production, be made by him on the issue document of title to the said land or, where the memorial relates to a lease or charge, on the duplicate thereof.

(3) No land, share or interest shall vest in the Official Assignee under any adjudication of bankruptcy, or order for administration in bankruptcy, until it has become registered in his name pursuant to this section.

[34] This raises the question of the right of a bankrupt in dealing with real property, a matter which was dealt with at some length by the parties during submissions at the end of the trial. By virtue of s. 24(4) Bankruptcy Act 1967, all his properties at the time of adjudication vested in the Director General of Insolvency. This would not affect the said property as it was acquired by the bankrupt first defendant after his bankruptcy in 2004. In other words, the said property was an "after-acquired" property that is property acquired by or devolves on the bankrupt after his adjudication but before discharge (*Hock Hua Bank Bhd v. Choo Meng Chiong & Anor* [1999] 7 CLJ 300; *Agroco Plantation Sdn Bhd & Anor v. Besharapan Sdn Bhd & Ors* [1998] 5 CLJ 19). It is trite law that a bankrupt has the legal capacity to enter into a contract to sell "after-acquired" property unless it is a contract that would amount to his carrying on a business (*Kwan Chew Shen v. Citibank, NA* [1987] 1 CLJ 314; [1987] CLJ (Rep) 704). However, by virtue of s. 48(1)(b)(i) of the Bankruptcy Act 1967, such "after-acquired" property should be accounted for to the Director General of Insolvency for distribution to the creditors. In other words, there is a legal obligation on the part of a bankrupt to inform the Director General of Insolvency.

[35] Now although the bankrupt has the legal capacity to enter into a contract to sell "after-acquired" property, a point which was canvassed strenuously before the court, it is also the law that any such contract is voidable at the option of the Director General of Insolvency and the proceeds of the sale of any such property by the bankrupt shall be deemed to be the property of the Director General of Insolvency by resort to s. 53B(1) Bankruptcy Act 1967.

[36] As alluded to earlier, the Director General of Insolvency can also apply and register itself as proprietor of any such property by recourse to s. 349 NLC. Until such property is registered, the Director General of Insolvency will be vested with an equitable interest in the said property (*Koh Thong Chuan v. The Official Assignee of the property of Koh Liang Hee, Bankrupt* [2003] 1 CLJ 125; [2003] 1 MLJ 113). It must therefore be the case that any person purchasing from the bankrupt "after-acquired" property or any interest in it with the knowledge of the bankruptcy acts at great risk to losing ownership of such property.

[37] Coming back to the facts in the instant case, with the knowledge that the second defendant had acquired property from a bankrupt, it was incumbent upon the third defendant bank to at least make inquiries as to how the bankrupt first defendant had come to acquire the said property. After all, a bankrupt is deemed to be a person who is unable to manage his financial affairs because of his debts. A bankrupt may well have acquired property as a gift or through inheritance but if that was not the case, it would be prudent and reasonable to make inquiries as to how such property came to be acquired. It is my respectful view that once you have such knowledge of bankruptcy, you cannot behave like an ostrich with its head buried in the sand as this will rightfully invite criticism of wilful blindness and voluntary ignorance.

[38] It is also unpersuasive to suggest that a bankrupt can enter into contracts for we are not here dealing with the validity of a contract but rather the question of the *bona fides* of the bank in registering its interest in the said property. It is even more unpersuasive to assert that since the Director General of Insolvency has taken no steps to avoid the disposal of the said property and the charge, the third defendant's registered interest in the said property ought not to be defeated. I think it would be an affront to common sense and good conscience if the Director

General of Insolvency had done so taking into account that the bankrupt first defendant had acquired the property through fraud. In keeping with this good conscience, I think the Director General of Insolvency has quite rightly refrained from asserting its right over fraudulently acquired property by a bankrupt.

[39] Considering all the circumstances, I am far from satisfied that the third defendant took its charge in good faith and for valuable consideration within the meaning as intended by the proviso of s. 340(3) NLC.

Fourth Issue

[40] The plaintiff, second and third defendants are maintaining in their pleadings that the fourth to fifth defendants and by vicarious extension the sixth defendant were negligent and reckless and in breach of their statutory duty. In particular, the second and third defendants are making a claim for indemnity in the event their interest in the said property is lost.

[41] It cannot be gainsaid that the fourth and fifth defendants owe a duty of care to members of the public and landowners to maintain a proper land register as well as to stringently comply with the provisions of the NLC to protect landowners' interests. Public trust and confidence in the Torrens system of land registration will be undermined and eroded if the integrity of the system is compromised. It is imperative that those responsible for issuing computerised land titles and maintaining records be persons of absolute honesty and conscientiousness. It is also of vital importance that the weakness of the computerised system not be exploited by rogues.

[42] In the instant action, it was plain and obvious that the provisions of the 14th Schedule of the NLC were not followed in the issuance of the computerised title for the said property. The plaintiff was not notified nor was the original IDT recalled and destroyed. It is obvious now that someone with criminal intentions took possession of the computerised title through the unlawful assistance by person/persons working in the land office.

[43] It is appalling to note that no explanation was given by any witness for the fourth and fifth defendants as to how this could have transpired. It appeared that no inquiry was even held to establish what went wrong. It ought to be reasonably foreseeable

A that if the computerised title is given to the wrong person, it might be used by rogues to cause mischief as has occurred in the present case.

[44] Adding to this gross dereliction of duty is the fact that the B impugned original instrument of transfer between the first and second defendant has now gone missing from the land office. This is a serious matter as the land administrator has an obligation to keep such documents in safe custody under s. 375 of the NLC. Such documents can only be removed from safe custody by the C order of a High Court Judge or a direction in writing of the state authority under s. 375(2) NLC.

[45] The fourth and fifth defendants have also shown contempt for an order of the court in originating summons No. 24-672-07-2012 given on 3 September 2012 to disclose the servants or D agents of the fourth defendant who handled the presentation and registration of the MOT from the plaintiff and the first defendant. They have failed to comply with this order and have given no explanation for this.

E **[46]** Given the circumstances, the fourth and fifth defendants cannot now hide behind s. 22 of the NLC and claim they acted in good faith in carrying out their duties. For these reasons, the fourth and fifth defendants and vicariously the sixth defendant are liable to indemnify the second and third defendants for their loss F of interest in the said property.

Fifth Issue

[47] The substance of the claim by the second defendant against the third party is that Daniel Lim, a partner in the third party, had G advised the second defendant to pay cash to the first defendant to conclude the deal. Now Daniel Lim in his evidence had denied ever doing so.

[48] Considering the evidence in its entirety, it is highly H improbable that Daniel Lim would have given this advice. It would be foolish to advice anyone to pay a large sum of money in cash to an undischarged bankrupt. In any case, the second defendant testified that it was the first defendant who wanted the payment in cash and an agreement was drawn up to that effect.

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[49] Even if there was such advice, there are three difficulties in the second defendant's claim. The first is that Daniel Lim was never engaged by the second defendant as he had refused to act for him and there was therefore no retainer. Secondly, it is inconceivable that the second defendant could have relied on this purported advice as second defendant was a literate businessman with several properties and had many lawyers amongst his friends. It appeared to me that the second defendant was bent on concluding this deal whatever the advice given to him. Thirdly, the second defendant knew the consequence of dealing with an undischarged bankrupt. He knew that the said property could be claimed by the Director General of Insolvency and ought to have considered that the bankrupt first defendant may be motivated to defraud his creditors. To found his claim now on this transaction would be against public policy as the court would not want to be seen to condone and approve of such conduct.

[50] For these reasons, the claim by the second defendant against the third party must fail.

Conclusion

[51] In view of the court's findings on the issues raised, it is plain that the plaintiff has made out its case and is entitled to judgment. In essence, the plaintiff is entitled to be restored as the registered owner and since the second and third defendants have failed to prove that they were *bona fide* purchasers for value, their interest in the said property is set aside and cancelled. Accordingly, there will be an order in terms of the statement of claim, paras. 22(a), (b), (c), (d) and (dd). There will not be any order as to damages. The plaintiff is also entitled to costs.

[52] As the fourth to sixth defendants have failed in their statutory duty to ensure a safe system of land registration, they will have to indemnify the second and third defendants. The measure of loss of the third defendant is more straightforward and it has to be the amount due on the loan. As such, the fourth to sixth defendants are to pay the third defendant the sum of RM479,387.02 with interest at BLR 1.60% per annum from 29 August 2013 till judgment and thereafter at 5% per annum from judgment till settlement. It is expected that with this payment, the third defendant will no longer have any claims against the second defendant on the loan and the charge.

[53] As for the second defendant, his original loss would be the sum of RM650,000 being the purchase price paid to the first defendant. However, he also obtained a loan of RM520,000 from the third defendant with the said property as security. So his loss is really RM130,000 being the difference between the sale price and the loan sum the second defendant received from the third defendant bank. His losses would also include the instalments he had paid to the third defendant bank as repayment on the loan. In the event of any dispute as to the instalment payments, the parties are at liberty to apply to the Senior Assistant Registrar for assessment of this part of the claim.

[54] Now the second defendant had also made a claim for renovation costs which costs he claims were incurred after he had come into possession of the said property. During case management, all parties were directed to file the bundle of documents for trial. The second defendant, however, only sought to introduce documents on the eve of the trial contrary to what was directed by the court. This attempt was disallowed as it would cause prejudice to the plaintiff and other parties to the dispute as they will have little or no time to check on the veracity of the documents as well as to produce opposing material of their own. It would be akin to the outdated mindset of "trial by ambush" where the policy of concealment was once thought to be what the adversarial process was about.

[55] There is now a growing appreciation that such policy of concealment does little to serve the interests of litigants and the interests of justice. Instead, the current thinking, and this is reflected in O. 34 Rules of Court 2012, is that all the cards must be on the table well before the trial begins unless there are good reasons for not doing so. It is now accepted that this new mindset of early disclosure is in the interests of a fair, expeditious and economical resolution of the dispute between the parties (see *Wilsher v. Essex Area Health Authority* [1986] 3 All ER 801; *Naylor v. Preston Area Health Authority* [1987] 2 All ER 353; *Chen Hoy Shan v. Professor Dr Aljafri Abdul Majid & Ors* [2011] 1 LNS 369). In the event, the claim for renovation costs of the second defendant was disallowed as these claims were made on bare averments without any other evidence.

[56] Finally, the second defendant's claim against the third party was without merit for the reasons set out earlier and is accordingly dismissed with costs.

[57] I come now to the issue of costs. Apart from the plaintiff and the fourth to sixth defendants, there has been some measure of success and failure for the second and third defendants. I would also note that the root cause of the predicament that the parties found themselves in lies with what transpired in the offices of the fourth and fifth defendants. In essence, it is their failure to ensure the integrity of the records in the land authority that has led to this action. The fourth to sixth defendants will therefore pay total costs assessed at RM60,000 to the plaintiff for themselves and on behalf of the second and third defendants. The fourth to sixth defendants will also pay costs of RM20,000 each to the second and third defendants. The second defendant will also pay costs to the third party assessed at RM20,000 on account of his claim being dismissed.

[58] Lastly, I wish to record my appreciation to all parties for their painstaking efforts in presenting well-reasoned submissions without which this judgment would not have been possible.